Supreme Court, U.S.
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No. 01-1392

In the Supreme Court of the United States

U.S.A. POLYMER CORP.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITIONER U.S.A. POLYMER CORP.'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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I. Procedural History

On March 18, 2002, Petitioner, U.S.A. Polymer Corp. ("Polymer") filed its Petition for Writ of Certiorari (the "Petition") with the Court. On April 19, 2002, the Court extended the Solicitor General's deadline to file its response to Polymer's Petition to May 22, 2002. On May 22, 2002, the Solicitor General, on behalf of the National Labor Relations Board ("the Board"), filed its Opposition Brief.

II. The Opposition Brief Misstates and Overlooks Polymer's Arguments Regarding 29 C.F.R. § 102.48

In its Opposition Brief, the Solicitor General misstates Polymer's argument and overlooks the more important issue that Polymer presented in its Petition regarding the Board's contradictory Rules and Regulations.[1] In its Opposition Brief, the Solicitor General states: "Petitioner argues that Board rules prevented petitioner from moving to submit additional evidence until after the Board rendered its decision on August 24, 1999. Petitioner is mistaken." Opp. Brief at 9. The Solicitor General goes on to state that the Board rules "plainly contemplate" that motions to introduce additional evidence should be filed when the additional evidence is discovered. *See id.* Not only does this assertion mistakenly interpret Polymer's argument in its Petition, the Opposition Brief fails to provide a complete picture of the ambiguity in the Board's Rules.

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[1] The Solicitor General also avoids altogether the issue that the passage of time is a fact that need not be presented to the Board or court of appeals; the effects of the passage of time can be recognized on their own.

Polymer does not argue in its Petition that the Board rules *prevented* Polymer from filing its Motion to Reopen the Record until after the Board's decision. Instead, Polymer argues that the Court's guidance is needed to resolve the apparent contradiction in Section 102.48(d)(1) and Section 102.48(d)(2) of the Board's Rules. 29 C.F.R § 102.48. As asserted in the Petition, Section 102.48(d)(1) states that a party "may move for reconsideration, rehearing, or reopening of the record *after the Board decision or order.*" Pet. at 17. However, Section 102.48(d)(2) directs a party to a Board proceeding to file any motion to introduce additional evidence "promptly on discovery of such evidence." Pet. at 17-18. The Fifth Circuit upheld the Board's denial of Polymer's Motion to Reopen pursuant to Section 102.48(d)(2)[2]. Therefore, although Polymer does contend that the Board and Fifth Circuit's interpretation of Section 102.48 is flawed, Polymer also seeks the Court's review in order to establish a clear standard with regard to when Motions to Reopen should be filed.

III. The Opposition Brief Avoids Polymer's Arguments Regarding the Impropriety of Enforcing a *Gissel* Bargaining Order in Favor of a New and Different Union

In its Opposition Brief, the Solicitor General sidesteps Polymer's arguments regarding the impropriety of enforcing a *Gissel* bargaining order on behalf of a new and different union. The Solicitor General contends that Polymer failed to meet its burden of disproving the continuity of representation

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[2] The Board's denial of Polymer's Motion to Reopen because it was three days late seems especially unreasonable in light of the Board's four year delay in reaching a decision.

as established by the factors in *Western Commercial Transp., Inc.*, 288 N.L.R.B. 214 (1988). Opp. Br. at 12. This argument fails to adequately respond to the arguments presented in Polymer's Petition. The Solicitor General fails to address the fact that a *Gissell* bargaining order has never been enforced on behalf of a new and different union. In addition, *Western Commercial* does not address the continuity of representation issue in the context of a *Gissel* bargaining order. *Western Commercial,* 288 N.L.R.B. 214 (1988). However, *Western Commercial* does refer to a 1986 case from this Court which states that "the long-understood role of the Board regarding union affiliations is to determine whether the 'affiliation raises a question of representation and, if so, conduct an election to decide whether the certified union still is the choice of majority of the unit.'" *See id.* (citing *NLRB v. Financial Inst. Employees Local 1182,* 475 U.S. 192 (1986)). In *Financial Institution,* this Court also stated that changed circumstances may alter the relationship between the union and the employees it represents, which may raise the question of whether the affiliated union enjoys continued majority support. *See id.* As outlined in its Petition, Polymer has undergone a number of changes in its workplace since 1995, changes that certainly call UNITE's continued majority support into question.

Moreover, as stated in the Petition, we were unable to find any case where a *Gissel* bargaining order was enforced in favor of a union that is separate and distinct from the union selected by the employees. Pet. at 24. To date, both the Board and the Fifth Circuit have overlooked the potential injustice that could result if employees are forced to bargain with a union other than the one they selected. Polymer seeks certiorari from the Court to correct this error and establish clear precedent to avoid this error in the future.

IV. Conclusion

The significance of the questions presented in Polymer's Petition cannot and has not been denied. The Opposition Brief fails to establish that the issues presented in the *Polymer* decision are not ripe for review by the Court. Therefore, Polymer respectfully requests that the Court grant Polymer's Petition.

Respectfully submitted,

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